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January 26, 2017

**VIA E-FILE AND E-MAIL TO gary.shinners@nlrb.gov  
AND OVERNIGHT MAIL**

Gary Shinners  
Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW  
Washington, DC 20570-0001

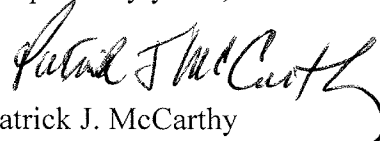
Re: **Request for Review of Regional Director's Dismissal of the Employer's  
Election Petition Filed Pursuant to Section 9 of the National Labor  
Relations Act** (Case 02-RM-184263 - 1650 Broadway Associates, Inc.)

Dear Mr. Shinners:

This Firm represents 1650 Broadway Associates d/b/a/ Ellen's Stardust Diner ("Stardust") in the above-referenced matter. Please include as part of our submission to the Board the attached Position Statement with Exhibits A through O, originally filed on October 26, 2016 with the NLRB Region 2 in support of Stardust's RM petition. Also enclosed for your reference is a copy of our Request for Review, submitted to you on November 29, 2016. We ask that both are included in the record that will be submitted to the Board.

By way of response to Union Counsel's (Mr. Dictor) Opposition to Petitioner's Request for Review of December 12, 2016, and to avoid any misunderstanding, Stardust did serve Mr. Dictor with the entirety of its November 29, 2016 submission to you. In Stardust's November 29, 2016 Request for Review to you, Stardust did not enclose the now attached position statement or exhibits because it believed they were already included in the record.

Respectfully yours,

  
Patrick J. McCarthy

cc: Mr. Benjamin N. Dictor via email at ben@eisnerdictor.com

# **POSITION STATEMENT**

**PATRICK J. MCCARTHY**  
Attorney at Law

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October 26, 2016

**VIA E-MAIL to ruth.weinreb@nlrb.gov**  
**AND FAX AND OVERNIGHT MAIL to:**

Ruth Weinreb  
National Labor Relations Board  
Region 2  
26 Federal Plaza, Room 3614  
New York, NY 10278

**Re: Statement of Position in Support of the Employer's Election Petition Filed Pursuant to Section 9 of the National Labor Relations Act**

Dear Ms. Weinreb:

This Firm represents 1650 Broadway Associates d/b/a Ellen's Stardust Diner ("Stardust" or "the Company") in the above-referenced matter. Please accept the following as Stardust's statement of position in support of the Company's RM petition meeting the statutory mandate under Section 9 of the National Labor Relations Act ("the Act"). Disclosure of the information contained herein could cause harm to Stardust, as well as affect the privacy interests of individuals mentioned. Stardust releases this information to the National Labor Relations Board ("the Board") under the condition that it will be maintained in confidence.

## **I. INTRODUCTION**

Stardust Family United ("SFU") is a labor organization which has repeatedly represented to the Company that it represents a majority of the Company's employees employed at Ellen's Stardust Diner. SFU has made a demand for immediate recognition and a demand to negotiate the terms and conditions of employment on behalf of the Company's employees whom it claims to represent. Indeed, for weeks it has engaged in a systematic campaign for its recognition including hand billing, picketing and protesting within and without Ellen's Stardust Diner, media appearances and press releases. SFU's campaign has been aimed at pressuring the Company to agree with it regarding the terms and conditions of employment of the Company's employees whom it claims to represent. In response to SFU's representations and request for bargaining, on September 9, 2016, the Company filed an RM petition pursuant Section 9 of the National Labor Relations Act ("the Act"). For the reasons set forth more fully below, the Board must hold an election in this matter.

## II. FACTUAL BACKGROUND

### A. About Stardust

Stardust is a 1950s-themed restaurant located at the corner of Broadway and 51st Street in Manhattan. Stardust, notable for its singing wait staff, has been in business since 1987. Many aspiring musical performers and actors are drawn to work as singing servers or wait staff, known as “Stardusters”. They often are performers in between show business jobs and/or who are frequently auditioning and otherwise pursuing a full time career in show business or other entertainment.

### B. SFU’s Demand for Recognition and Continuing Campaign for Recognition

On August 26, 2016, representatives of SFU e-mailed Ken Sturm, an officer of Stardust, declaring that “the employees of Ellen’s Stardust Diner have organized to stand up for our rights and the conditions of our employment.” (See August 26, 2016 e-mail at 9:18 a.m. from Stardust Family United to K. Sturm, attached as Ex. A.) That e-mail also identified those whom it claimed to represent, namely that “[SFU] represents the interests of all front and back of house staff.” (*Id.*) (emphasis added.) That e-mail further indicated that SFU was “working to guarantee that all employees are safe, secure, fairly compensated and treated with the respect and dignity they deserve.” (*Id.*) Less than an hour later, representatives of SFU e-mailed Mr. Sturm stating that “all further meetings with staff will be arranged through the union” and that certain employees, then noticed to meet with management, would not meet with Mr. Sturm if the purpose of those meetings was to discuss “union activity, including the job-related protected concerted activities that have been taking place at the diner.” (See August 26, 2016 E-mail at 10:12 a.m. from Stardust Family United to K. Sturm, attached as Ex. B.)

SFU again proclaimed that it had formed a union in an a New York Times article published on August 26, 2016. (See THE NEW YORK TIMES, A Manhattan Diner’s New Management has Servers Signing a Defiant Tune, *available at* <http://www.nytimes.com/2016/08/27/nyregion/a-manhattan-diners-new-management-has-servers-singing-a-defiant-tune.html>, attached as Ex. C.) The Times article further reported SFU’s representations that over 50 workers were involved in organizing, that they had notified management of their newly formed union on August 26, 2016 and were “seeking a variety of changes, including higher wages for nontipped employees, protection from what they describe as a campaign of arbitrary discipline and a measure of job security, which they believe they have lost under the new management regimen.” (*Id.*)

On or about August 28, 2016<sup>1</sup>, SFU began publicly soliciting donations for “the union.” (Stardust Family United Crowd-Funding Website, *available at*

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<sup>1</sup> SFU may have been soliciting donations and seeking additional financial support earlier than August 28, 2016. However, this is the earliest public solicitation the Company has been able to identify. SFU’s fundraising efforts continue through the present. (See Ex. D.)

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<https://www.youcaring.com/stardust-family-united-634720>, attached as Ex. D.) Since that date, SFU has been engaged in a fundraising effort to finance its newly formed union. (Id.)

On August 29, 2016, SFU issued another press release. (See August 29, 2016 Press Release titled “Singing Waiters Organize Against Alleged Unfair Treatment at Ellen’s Stardust Diner,” attached as Ex. E.) In that press release, SFU again represented that it is comprised of “all back of the house workers, servers, runners, bussers, dishwashers and cooks. . .” (Id.) (emphasis added.) It further stated that through the assistance of another union, SFU has the resources “to form [their] own union on ‘their’ terms.” (Id.) Similar to its prior press release, SFU reiterated and unequivocally proclaimed “[i]n response to current working conditions, the employees of Ellen’s Stardust Diner have organized and are fighting for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and back of house staff.” (Id.) (emphasis added.)

On the heels of its second press release, on August 30, SFU representatives identifying themselves as “union representatives” by email requested to meet with Mr. Sturm at 1 p.m. on September 2 to discuss “restaurant operations” that would “benefit both the staff and the company.” (See August 30, 2016 e-mail from Stardust Family United to K. Sturm, attached as Ex. F.)

On September 9, 2016, Brent Yessin, counsel retained by Stardust, had a discussion with several self-identified leaders of SFU including, Kenton Fridley, to confirm SFU’s demand to negotiate the terms and conditions of their employment with Company management. (See Affidavit of Brent W. Yessin (“Yessin Aff.”), attached as Ex. G at ¶ 8.) During that discussion, SFU representatives again claimed to represent the majority of the employees at Ellen’s Stardust Diner, including those in the “front and back of the house” which the SFU representatives further clarified encompassed “servers, bussers, runners, cooks and dishwashers, among others.” (Id. at ¶ 9.)

On September 9, 2016, the Company filed the RM petition currently at issue. It did so given that the SFU demanded recognition by presenting itself as representing all front and back of the house employees at Ellen’s Stardust Diner and demanding to negotiate over compensation and employee treatment, amongst other terms and conditions of employment. In addition, SFU has continued to engage in recognitional picketing at various times including on September 2 and September 5, September 26, October 11 and October 15.

On September 14, 2016, SFU issued a press release which was forwarded to Mr. Sturm. (See September 14, 2016 e-mail from Stardust Family United attaching press release titled “Unionized Staff at Ellen’s Stardust Diner to Stop Singing After Multiple Terminations” attached as Ex. H.) Declaring its intentions, purpose and current status, SFU titled the press release “Unionized Staff at Ellen’s Stardust Diner to Stop Singing After Multiple Terminations.” (Id.) The press release again indicated that SFU was the “Stardust employees’ union branch”

which was at that time “supported by over 70 employees of the restaurant.” (Id.) That press release further stated that SFU would be “escalating union tactics.” (Id.)

Later that day, SFU again e-mailed Mr. Sturm requesting a meeting to discuss terms and conditions of employment including, “new equipment, adequate staffing and the immediate cessation of [alleged] Unfair Labor Practices and the reinstatement of all employees [allegedly] unlawfully fired on and after August 24th.” (See September 14, 2016 e-mail from Stardust Family United to K. Sturm, attached as Ex. I.) SFU’s correspondence further stated that they were “interested in coming to a solution that is agreeable for both sides.” (Id.)

Thereafter, SFU increased hand billing, picketing and protesting of Stardust. SFU representatives also distributed handbills at and around the premises of Ellen’s Stardust. The handbills alleged, among other things, that the Company had responded to the “unionization” of its employees by firing six “union members and organizers.” (See Stardust Family United Handbill, attached as Exhibit J.) The handbill further stated that in response to those firings “servers [would] cease all singing in the restaurant for short intervals throughout the day.” (Id.)

SFU has continued declaring itself as a union and harassing Stardust, as recently as demonstrating on October 22 (Saturday night), to compel recognition and bargaining. On an almost daily basis, SFU posts images and videos depicting numerous protests, including recognitional picketing in front of Ellen’s Stardust Diner. In a recent example, on October 15, SFU posted a video to its Facebook page (which is one of many) depicting its picketing and protesting. (See October 15, 2016, 6:13 p.m. Facebook video, attached as Ex. K.) In the video, an SFU representative loudly and clearly declares that the employees of Stardust “formed a union” and declares that they are seeking “better [working] conditions.” (Id.) Also on October 15, SFU deployed pickets bearing signs declaring, among other things, “Hey! We’re a Union!” (Id.) SFU has posted numerous other pictures on social media of their recognitional picketing efforts. For example, on September 26, SFU promoted a protest using a picture with pickets prominently displaying signs stating “UNIONIZED MAKE SOME NOISE” and “10 servers FIRED for Union Activities in 24 hours.” (See Facebook Post dated September 26, 2016, attached as Ex. L.) Additionally, on October 11, SFU posted a picture depicting a picket holding a sign declaring “I’m sticking with the UNION!” (See Stardust Family United Facebook Post dated October 11, 2016, attached as Ex. M.) Nearly every SFU social media post bears the hashtag “union” in reference to the content and purpose of the pictures. (See e.g. Ex. N.) Again, on October 22, SFU conducted a protest aimed at fighting “to ensure the health and safety of those employed by Ellen’s. Fix broken equipment. Make good on workman’s comp [sic] claims.” (See Stardust Family United Facebook Post October 22, attached as Ex. O.) SFU directed its protect directly at Company management, including Mr. Sturm. (Id.)

SFU also maintains a website, on which it declares, similar to its previous representations that the union was formed “[i]n response to current working conditions, the employees of Ellen’s Stardust Diner have organized and are standing up for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and

back of house staff. (See Stardust Family United, Our Family, available at <http://www.stardustfamilyunited.com/ourfamily>.)

### **III. LAW AND ARGUMENT**

#### **A. Section 9 of the Act**

Section 9(c)(1) of the Act provides in relevant part that where a petition is filed: “(B) by an employer, alleging that one or more labor organizations have presented to [it] a claim to be recognized as the representative defined in section 9(a) . . . the Board shall [process the petition].”

Section 9(a) provides in relevant part: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” New Otani Hotel & Garden, 331 N.L.R.B. 1078 (N.L.R.B. 2000).

Thus, an employer is entitled to an election pursuant to Section 9(c)(1)(B) if there is evidence of a demand for immediate recognition by a majority of employees in an appropriate bargaining unit. Id. This is true particularly as here where it is enduring constant pressure and subjected to business disruptions over two months asking for bargaining.

#### **B. SFU is a Labor Organization Which Claims to Represent a Majority of Employees.**

##### **1. Labor Organizations Under Section 2(5) of the Act.**

Section 2(5) of the Act defines a labor organization as: “[a]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”

In order to constitute a labor organization under Section 2(5) the organization must satisfy two requirements: (1) employee participation and; (2) for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. See e.g. Polaroid Corp., 329 NLRB 424 (1999); Miller Indus. Towing Equip., Inc., 342 NLRB 1074 (2004). SFU clearly satisfies both of these requirements with regard to Stardust.

##### **a. *SFU is Comprised of Stardust Employees***

SFU undoubtedly has employee participation. SFU has indicated on several occasions to both the Company and the general public that it represents employees of Stardust Diner,

including those employees “in the front and back of the house.” (See e.g. Exs. A, B, C, F, & H.) Moreover, SFU’s website clearly states “[i]n response to current working conditions, the employees of Ellen’s Stardust Diner have organized and are standing up for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and back of house staff.” See Stardust Family United, Our Family, available at <http://www.stardustfamilyunited.com/ourfamily>.) As such, SFU satisfies the first requirement.

b. *SFU Satisfies the “Dealing With” Requirement*

SFU also satisfies the second requisite element as its only articulated purpose is to deal with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work for the front and the back of the house employees. The Board and courts interpret the “dealing with” requirement broadly. In order to satisfy this requirement a labor organization must “exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” NLRB v. Cabot Carbon Co., 360 U.S. 203, 212 (1959). No magic words must be said in order for the SFU to satisfy the “dealing with” requirement. Moreover, the union need not be part of an established framework of an international or national union.

The SFU has satisfied the broad framework of the “dealing with” requirement. SFU has made several demands to Mr. Sturm to bargain compensation, discipline and other terms and conditions of employment. (See Exs. B, F & I.) Even the “restaurant operations” issues that SFU sought to discuss with Mr. Sturm necessarily implicate employees’ terms and conditions of employment in the context raised by SFU of “stand[ing] up for our rights and the conditions of our employment.” (See e.g. Exs. C, E, F, & J.) As such, SFU unquestionably satisfies the “dealing with” element of Section 2(5). See Cabot Carbon Co., 360 at 212 (holding that an employee-committee system was a labor organization because it had discussions with management relating to seniority, job classifications, holidays, vacations, and various other conditions of employment); Thompson Ramo Wooldridge, Inc., 132 NLRB 993, 995 (1961) (holding that presentation to management of employee ‘views,’ even without specific recommendations as to what action is needed to accommodate those views, constitutes “dealing with” under Section 2(5).)

**C. SFU Demanded Immediate Recognition**

SFU has made a demand for immediate recognition and bargaining. On August 26, 2016, SFU declared that it is the sole representative of Stardust employees and that “all further meetings with staff [would] be arranged through the union.” (See Ex. B.) Additionally, SFU has demanded a meeting with the Company to discuss the terms and conditions of employment of the employees at Stardust on at least three occasions. On August 30, SFU representatives requested to meet with Company representatives, including Mr. Sturm, to discuss a litany of working conditions that it previously had identified. (Ex. B; see also Ex. G, Yessin Aff., ¶ 7.)



On September 9, SFU representatives again demanded to negotiate terms and conditions of employment with Stardust. (Ex. G, Yessin Aff., ¶ 8.) While some of the demands may have been unartfully crafted, given SFU's meeting request and apparent attempt to prevent the Company from making any decisions on issues involving wages, benefits and other terms and conditions of employment of the employees without its involvement, as well as the SFU's unambiguous attempt to bargain for the employees on their compensation and other terms and conditions of employment, it is without question that SFU made a demand for immediate recognition and bargaining. There would be no reason for the Company to meet with SFU over wages, benefits or other terms and conditions of employment unless that group was demanding recognition by the employer to recognize it as representing the employees.

SFU again e-mailed Mr. Sturm on September 14, 2016, demanding a meeting with Mr. Sturm to discuss terms and conditions of employment, including immediate cessation of what it alleged to have been unfair labor practices and an agreement to reinstate employees it claimed to have been unlawfully terminated. (Ex. I.) SFU's communicated purpose of the meeting was to come to a "solution" that was "agreeable for both sides." (*Id.*) Implicit in its demand to discuss a "solution" regarding the terms and conditions of employment, is a demand for an agreement, whether it be oral or written. Indeed, there is no other logical conclusion for such demands. As such, SFU has made a demand for immediate recognition and the Company's election petition must be processed. See New Otani Hotel & Garden, 331 N.L.R.B. 1078 (N.L.R.B. 2000); Robert's Tires, 212 N.L.R.B. 405 (N.L.R.B. 1974); Holiday Inn of Providence, 179 N.L.R.B. 337, (N.L.R.B. 1969); Capitol Market No. 1, 145 N.L.R.B. 1430, (N.L.R.B. 1964).

Moreover, the Board has found there is an immediate demand for recognition where in the context of other related events an object of picketing is to press upon the employer a demand for immediate recognition. See e.g. Capitol Market No. 1, 145 N.L.R.B. at 1431 (holding that the union's threatened and initiated picketing was in furtherance of union's immediate recognition claim after union demanded employer to sign a contract.) Here, SFU's two month campaign of media and picketing and harassment at the Stardust restaurant is clearly targeted at obtaining immediate recognition and persuading the Company to bargain with it.

As discussed above, SFU demanded recognition and demanded bargaining over terms and conditions of employment on August 26, and again on August 30. (See Exs. B & F; see also Ex. G, Yessin Aff., ¶ 7). (*Id.*) The Company did not respond to SFU's bargaining demands and shortly thereafter, on September 2 and September 5, engaged in organizational picketing. (See Ex. G, Yessin Aff., ¶ 5; see also RM Petition filed on September 9, 2016.) SFU again demanded recognition and to bargain on September 9 which was followed closely by SFU's most recent written demand to meet with the Company to discuss the terms and conditions of employment and reach agreement as to those bargaining items, on September 14. (Ex. I.) The Company did not respond to SFU's demand and, since that time, SFU has continued picketing Stardust's premises, repeatedly declaring its status as a union and proclaiming that it was seeking to negotiate terms and conditions of employment. (See Exs. J-O.) Indeed, SFU has engaged in organizational picketing on many occasions including on September 26, October 11 and October

15. (See e.g. Exs. K-O.) Despite whatever representations SFU has or may make to the Board, they have picketed as recently as this past Saturday night ( October 22).

SFU has, therefore, made a demand for immediate recognition and the Board precedent compels that the Board must not dismiss the election petition. See Robert's Tires, 212 N.L.R.B. at 406 (upholding employer's petition for an election pursuant to Section 9(c) because "the circumstances giving rise to the picketing, including the Union's admitted attempt to persuade the employer to come to an agreement regarding terms and conditions of employment); Holiday Inn of Providence, 179 N.L.R.B. at 338 (holding that union's comment "[a]re you ready to give up?" in the context of ongoing picketing was sufficient to constitute a continued interest in immediate recognition); Normandin Bros. Company, 131 N.L.R.B. 1225, 1226 (N.L.R.B. 1961) (holding that question affecting commerce existed concerning representation of certain employees of the employer under Section 9 because union's picketing was consistent with a demand to bargain for a contract.)

Assuming *arguendo* that SFU argues that it was not seeking representation, that argument still fails. The NLRB has held that explicit representations that employees are not requesting immediate recognition, when taken in context with other actions consistent with a demand for immediate recognition, are insufficient to defeat an employer's election petition. See e.g. Holiday Inn of Providence, 179 N.L.R.B. at 338 (holding that letter to employer's parent company indicating that the union was seeking permission in order to establish proper procedure for negotiating union contract was demand for immediate recognition despite later providing notice that it was "not attempting to organize the employees of this establishment and is not requesting recognition for this establishment.") Therefore, SFU's actions including engaging in organizational picketing consistently throughout September and October up to the present time on many occasions including on September 26, October 11 and October 15 and conducting union demonstrations every Saturday since September 14, including most recently on this past Saturday which was targeted directly at Company management undermine any argument that SFU has not demanded immediate recognition. (See Exs. J-O.) Thus, should SFU argue that it was not seeking recognition, its actions throughout September and October of 2016 belie that claim. See Grand Central Liquors, 155 NLRB 295, 301-02 (1965) (holding that employer's election petition must be processed because the union's entire course of conduct was inconsistent with its expressed disclaimers); Rusty Scupper, 215 NLRB 201 (1974) (holding that union had made a demand for recognition despite disclaimer that it was not seeking recognition because the disclaimer was inconsistent with object of picketing.) Plainly and clearly, the SFU's actions are consistent with a demand for recognition.

#### IV. CONCLUSION

All of the facts support the Company's basis for filing the RM Petition with the Board. Given that SFU is a labor organization claiming to represent the majority of Stardust's employees and is demanding immediate recognition, the Board under its statute is obliged to process the RM petition in this case. Accordingly, because SFU has made a demand for

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immediate recognition and continues to enforce that demand, the Board must not dismiss and should resume processing the employer's election petition.

Very truly yours,

Patrick J. McCarthy

# **EXHIBIT A**

**From:** Stardust Family United <[joehill@stardustfamilyunited.com](mailto:joehill@stardustfamilyunited.com)>

**Subject:** Stardust Family United

**Date:** August 26, 2016 at 9:18:01 AM EDT

**To:** [joey@theribbonnyc.com](mailto:joey@theribbonnyc.com), [ken@theiridium.com](mailto:ken@theiridium.com), [ken@thesocialmerchant.com](mailto:ken@thesocialmerchant.com), [ksturm@globaldps.com](mailto:ksturm@globaldps.com), [mairead@thesocialmerchant.com](mailto:mairead@thesocialmerchant.com), [melissa@ellensstardustdiner.com](mailto:melissa@ellensstardustdiner.com), [Brigitte@ellensstardustdiner.com](mailto:Brigitte@ellensstardustdiner.com), [jason@theribbonnyc.com](mailto:jason@theribbonnyc.com), [lisa@theiridium.com](mailto:lisa@theiridium.com), [stardustdipu@yahoo.com](mailto:stardustdipu@yahoo.com), [tricialic@gmail.com](mailto:tricialic@gmail.com), [scottbarbarino@gmail.com](mailto:scottbarbarino@gmail.com), [quddus1725@yahoo.com](mailto:quddus1725@yahoo.com), [glen@sturnnyc.com](mailto:glen@sturnnyc.com)

Please see attached letter.

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We. are. Stardust (Family United).

To whom it may concern:

The employees of Ellen's Stardust Diner have organized to stand up for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and back of house staff.

SFU is a branch of the Industrial Workers of the World (IWW), the singing union. We are working to guarantee that all employees are safe, secure, fairly compensated and treated with the respect and dignity they deserve.

Our mission is to preserve the Stardust family legacy in order to ensure that future generations of Stardusters and customers alike can enjoy the same experience that gives Ellen's its reputation. In order to do this, we must restore the trust between all employees so that we can move forward as the team we once were.

Any terminations or disciplinary action of any kind will be considered retaliation for union activity. This is against the law, and we are prepared to take legal steps to protect our rights.

This is our right and our responsibility. We are Stardust (Family United).

Thank you for your time and consideration.

Stardust Family United

# **EXHIBIT B**

**From:** Stardust Family United <[joehill@stardustfamilyunited.com](mailto:joehill@stardustfamilyunited.com)>

**Subject:** Meetings Today

**Date:** August 26, 2016 at 10:12:35 AM EDT

**To:** [ken@theiridium.com](mailto:ken@theiridium.com), [ken@thesocialmerchant.com](mailto:ken@thesocialmerchant.com)

Dear Ken,

Unfortunately Kevin, Kristine, Dono, Grace and Eric are not available to meet with you today. They will comply with requests to meet at another time, but not if those meetings are meant to discuss union activity, including the job-related protected concerted activities that have been taking place at the diner.

If you, or any manager would like to discuss Stardust Family United, you can email [joehill@stardustfamilyunited.com](mailto:joehill@stardustfamilyunited.com) to coordinate that. All further meetings with staff will be arranged through the union.

We will also consider any retaliation to be in violation of the law and will take appropriate legal steps to protect our rights.

Our intention is to improve our relationship with management and ownership. We lead with love.

Regards,

Stardust Family United

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We. are. Stardust (Family United).

#stardustFU



# **EXHIBIT C**

**The New York Times** | <http://nyti.ms/2bNb9Ca>

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N.Y. / REGION

# A Manhattan Diner's New Management Has Servers Singing a Defiant Tune

By SARAH MASLIN NIR AUG. 26, 2016

Clutching bottles of ketchup as if they were microphones, three waitresses stood atop vinyl banquettes at Ellen's Stardust Diner near Times Square the other day, belting out the chorus of a 1984 Twisted Sister hit: "Oh, we're not gonna take it! No, we ain't gonna take it! Oh, we're not gonna take it anymore!"

Customers, many of them out-of-towners there to see the singing servers for which the 1950s-style restaurant is known, put down their iPhones to applaud. Kristine Bogan stepped down from a banquette. "That one," she said, referring to the song, "is new."

It was also a coded reference to a battle unfolding inside the popular diner, where Broadway hopefuls and itinerant performers have serenaded tourist-heavy crowds tucking into cheeseburgers and waffles for more than 20 years. Art and food service have always coexisted at Ellen's, where actors and singers relished the chance to earn money, hone their craft and audition in their off hours.

But in the last eight months, according to employees of the restaurant, a new management team has fired more than 30 of their colleagues — servers and kitchen workers — while instituting new policies that staff members said threatened their acting careers, their livelihoods and, potentially, the feature that made the restaurant a haven for aspiring stars. On Friday, workers representing a group of over 50 employees notified management that they had formed a union after months of organizing secretly.

The workers are seeking a variety of changes, including higher wages for nontipped employees, protection from what they describe as a campaign of arbitrary discipline and a measure of job security, which they believe they have lost under the new management regimen.

More than job security, though, the workers said what was at stake was the preservation of a performer's utopia: a place where many would return to wait on tables between stints in regional theater or on "American Idol," and where artists could easily pursue big city dreams and still pay the rent.

"New York is a tough place to be, and Ellen's claims to be this place where you have a home in between you pursuing your dreams, and they are trying to take that away from us," said Meg Doherty, 31, a waitress whose specialty is jazz standards.

The restaurant's owner, Ken Sturm, said that the workers' dissatisfaction had come as a surprise and that their concerns would be addressed. Ellen's is named for Mr. Sturm's mother, Ellen Hart-Sturm, a former Miss Subways beauty queen.

"This is a little family business that's been in Times Square since 1995, when Times Square was still a toilet, and we give these guys the opportunity to ply their craft in the middle of the theater district to sing," he said. "I welcome and have always welcomed the opportunity to make their life a little bit better, because it's a brand, and at the end of the day, you're only as successful as your employees."

The difficulties began in January, according to a half-dozen servers and a letter sent to Mr. Sturm by the union, Stardust Family United. Mr. Sturm hired several new managers who pledged a better-run, more streamlined way of delivering egg creams and musical numbers. What happened instead, the workers said, was a mass firing of longtime servers, many for small offenses or ones seemingly beyond their control. Last week, for example, a waitress was fired when a table of customers left without paying, Ms. Bogan and others said.

Servers at Ellen's are known as Stardusters, and their head shots grace the diner's walls and website like celebrities in a playbill. But behind the scenes, workers said, the new managers warned them that they were easily replaceable. When employees complained about a new scheduling system that prevented them from

switching shifts so they could make it to auditions — the point, many said, of working at Ellen's — they were derided as divas.

"Stardust was basically our home," said Brian Esposito, 23, a waiter known for renditions of songs from the musical "Hamilton." "You always felt safe coming there; it was a community of artists. But now, so many people, some who have been there for five-plus and 10-plus years, they walk in and they're crying in the back hallway."

Marianne LeNabat, an organizer with the Industrial Workers of the World, a union that helped guide the servers through the process of organizing a union, said she was stunned by the situation at Ellen's.

"I'm actually kind of shocked when they tell me what's going on in that workplace and especially because it's the kind of place where the staff is really, really dedicated," she said. "A lot of workplaces throw the word 'family' around, but these workers really think of each other as family."

Shifts have been extended and waiters have been compelled to take on more tables, workers said, increasing customer frustration over long wait times. On Yelp, many customer reviews praise the singing and criticize the slow service.

"Today I spilled water," Mr. Esposito said a few days before the announcement about the union's creation, "and I genuinely thought I was going to get fired."

For those who have worked at Ellen's, one of its biggest assets was that it allowed many to go on hiatus whenever they landed roles beyond the upholstered booths, said Zak Resnick, 29, who worked there for the past decade. In his case, that meant leaving for several years at a time, for a role in "Mamma Mia!" on Broadway and a stint on "American Idol."

Now, waiters have to wrangle to get back jobs that once felt guaranteed. "Nobody else in the world lives the way we do," said Mr. Resnick, who quit the restaurant last month as a result of the changes. "Ellen's is so important to people like us, it gives us the fallback plan to do what we moved to the city to do."

Mr. Sturm said the policy of letting workers take time off had not changed. He cited several who are currently on the road performing and will be returning to work

when their tours end. The average tenure of Ellen's employees, he said, was 10 1/2 years. Those who had not been welcomed back, he added, had performance issues such as being late or missing work.

"When we've been in business for about 30 years at this point," said Mr. Sturm, whose family has operated other restaurants under the Ellen's name, "and that they would have to do something like this is kind of sad, and I feel bad for them."

Max Demers, 33, has worked for over a decade at Ellen's, where he sings country songs, and where he met his fiancée, another performing server. Staff members' complaints, he said, were not meant as retribution against the diner, but as an effort to protect a haven for artists.

"I was always a pretty good singer and an actor," he said, but "I blossomed into a performer through Ellen's."

A version of this article appears in print on August 27, 2016, on page A16 of the New York edition with the headline: A Manhattan Diner's New Management Has Servers Singing a Defiant Tune.

# **EXHIBIT D**



## Stardust Family United

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Ellen's Stardust Diner, the home of the world famous singing waitstaff, is a New York City institution that has been serving up diner classics and live entertainment since

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# STARDUST FAMILY UNITED

For: STARDUST FAMILY UNITED

New York, NY

Organizer: Stardust Family United



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## The Story

Ellen's Stardust Diner, the home of the world famous singing waitstaff, is a New York City institution that has been serving up diner classics and live entertainment since 1987. Over the years, Ellen's has grown exponentially into one of NYC's busiest and most profitable restaurants. We provide high volume crowds of all ages the opportunity to enjoy performances from "the future stars of the stage and screen" in a fun and interactive environment, all for the price of a cheeseburger. With an impressive track record of Broadway success stories, Ellen's has become not only a beloved tourist attraction, but a springboard for hundreds of New York City's most talented performers chasing their dreams in the Big Apple.

Our mission is to preserve the Stardust family legacy in order to ensure that future generations of Stardusters and customers alike can enjoy the same experience that gives Ellen's its reputation.

Our mission is one of integrity. A fight happening all across America and all over the world. The fight for worker's rights! We believe in democracy and in the rights of The People, and as we rise up with our voices we know we will be met with pushback. So we need your help.

We are trying to raise \$5000.00 so we can continue to organize, continue to communicate with the world, fight back against legal retaliation and to protect the livelihoods of our unfairly terminated co-workers.

First and foremost your donations will go toward legal fees. We anticipate a strong legal offensive strike

[Read More](#)

# Fundraiser Updates (2)

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Posted on September 25, 2016 by *Stardust Family United*

On the afternoon of September 14th, employees who were not outside protesting were told to close out their final tables and finish work. The restaurant, for the first time in memory, was closed to the public due to a "private event". The remaining staff of Ellen's Stardust Diner gathered downstairs in their sister restaurant, the Iridium Jazz Club, where servers were plucked out one by one to "check in for their shifts". Servers were brought upstairs into the closed restaurant and falsely accused of misconduct as a pretext for retaliatory termination for union activity. After the terminations were completed, Sturm read to remaining staff from a piece of paper. The bewildered and anxious staff listened to the owner of a business they spent so many hours building. "I feel like the rape victim who was accused of wearing a short dress," Sturm

[Read more...](#)

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Posted on September 25, 2016 by *Stardust Family United*

Stardust Diner Family United Says '15 Employees Fired in Retaliation of Union Activity

Share this update:



## About the Organizer

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**ERIC JETNER**

**VERIFIED BY:**

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## Comments

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## Supporters (58)

<b>\$75</b> 4 days ago	<b>John Patrick Ferreira</b> Stick it to the man. Fight for what's right
<b>\$25</b> 4 days ago	<b>Kris Warner</b>
<b>Amount Hidden</b> 2 weeks ago	<b>Rebecca Vizulis</b> Hang in there guys! You are all doing the right thing!
<b>\$250</b> 2 weeks ago	<b>Michael Wolk</b>
<b>\$20</b> 3 weeks ago	<b>Lynda Williams</b> My daughter was one of the Stardusters forced out with a bogus excuse before the Union was formed. She and I are strong supporters of the campaign to return respect for staff to Ellen's, and to make it again the premier place for performers to appear while auditioning, or between show runs. You all rock!!
<b>\$20</b> 4 weeks ago	<b>Jessi Jumper</b> Support from Seattle!
<b>\$50</b> 4 weeks ago	<b>Cristina Gallo</b> Please do Stardust After Dark again!!
<b>\$100</b>	<b>Suellen Vance</b>

Sep 24, 2016

**\$50****Kim Niemeier**

Sep 24, 2016

Supporting you all from Alabama!!!

**\$25****Marci Heckler**

Sep 23, 2016

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# **EXHIBIT E**



## Singing Waiters Organize Against Alleged Unfair Treatment at Ellen's Stardust Diner

August 29

<http://www.broadwayworld.com/article/Singing-Waiters-Organize-Against-Alleged-Unfair-Treatment-at-Ellens-Stardust-Diner-20160829>



BroadwayWorld received a statement today from employees of Ellen's Stardust Diner, "home of the world famous singing waitstaff," who have joined forces with the Industrial Workers of the World (I.W.W.) to establish Stardust Family United in order to dispute alleged unhealthy working conditions, disrespectful treatment from owners and management, and fight for higher wages for its non-tipped employees.

The diner features "the future stars of the stage and screen" in a fun and interactive environment - all for the price of a cheeseburger.

The lengthy statement reads:

*"Since new management took over operations in January of 2016, a significant number of employees have been targeted, ultimately being terminated or antagonized into leaving the job. Workers are subjected to unsafe and hostile working conditions and have been routinely denied compensation for on-the-job injuries. In order to protect the rights and health of the staff, including all back of house workers, servers, runners, bussers, dishwashers and cooks, Stardusters have joined forces with the IWW, a member-run union for all workers.*

*"Workers claim management has been dismissive of staff concerns regarding employee safety and working conditions; discouraging communication, intentionally creating confusion, and dodging accountability. After SFU went public on Friday, management removed all*

*messaging abilities from the employee scheduling and messaging system known as "HotSchedules," making it impossible for staff to keep track of communications with management regarding scheduling, policy and procedure, health and safety concerns, and so on. HotSchedules was the only way for staff to communicate with management in writing. They also put the Director of Entertainment, an employee of over 12 years who is in charge of hiring talent, on forced leave.*

*"Ken Sturm told Sarah Maslin Nir from the New York Times that employee dissatisfaction had 'come as a surprise.' Both current and former employees have reached out to him on multiple occasions with concerns regarding new management and unfair labor practices. Since then, they have taken away multiple benefits that servers have enjoyed for over 15 years. Workers have also been told multiple times by new management to never go to the owner with concerns. In January, workers were told they would be fired if they acted collectively to change policy (in reference to a petition regarding a manager's termination).*

*"The owners and management of one of the busiest single location restaurants in the world, one that boasts of their "world famous singing waiters," should be able to provide their employees safe and fair working conditions and wages. The I.W.W. has given us the resources and freedom we need in order to form our own union on our terms,' explain a committee representing the staff who have joined with the Union. 'Employees everywhere are challenged with the same unfair labor practices with which we've been dealing. Employers all over the world are understaffing, overworking, and underpaying their employees in the name of profit. We want workers everywhere to know that with solidarity, you can speak truth to power and stand up against injustice.'*

*"Ellen's Stardust Diner, the home of the world famous singing waitstaff, is a New York City institution that has been serving up diner classics and live entertainment since 1987. Over the years, Ellen's has grown exponentially into one of NYC's busiest and most profitable restaurants. We provide high volume crowds of all ages the opportunity to enjoy performances from "the future stars of the stage and screen" in a fun and interactive environment, all for the price of a cheeseburger. With an impressive track record of Broadway success stories, Ellen's has become not only a beloved tourist attraction, but a springboard for hundreds of New York City's most talented performers chasing their dreams in the Big Apple.*

*"Thanks to its flexibility in scheduling, a welcoming policy for returning employees, and a work environment that encourages creativity, support and friendship, a position at Ellen's has become one of the most coveted service industry jobs for artists in New York City. Flexible scheduling allows employees to take full advantage of audition opportunities. If an employee in good standing books a show, they have been welcomed back at the end of their contract, providing them financial stability between performing jobs. Additionally, employees share networking opportunities, collaborate on creative projects, and regularly work on performance material. These benefits attract both up-and-coming performers and Broadway veterans alike, making Ellen's a diverse and supportive family of artists from across the globe.*

*"In January, Stardusters were given notice that the corporation was expanding and a brand new management team would be taking over operations of the diner. The owners and new management team decided to cut labor costs in an attempt to maximize profits, leaving employees overworked without commensurate wage increases. A large number of employees have since been terminated, while others were antagonized and targeted by management until they felt compelled to quit. Workers are now leaving at a rate never before seen at Ellen's, and unfortunately, not to join Broadway casts and national tours. Additionally, employees returning from theatre contracts have been met with resistance when trying to resume work. Our job security has been threatened and our work environment has become unfair, unsafe and hostile.*

*"Management has been generally dismissive of our concerns regarding employee safety, scheduling, hours, and working conditions; discouraging communication, purposely creating confusion, and dodging accountability. Numerous safety violations have been ignored. Our sound system has never been installed or maintained correctly and is a danger to employees' hearing and vocal health. Employees have been refused workmans comp, sick and vacation pay and there have been numerous unaddressed incidents of sexual, racial, religious, size and age discrimination. There has also been an explicit effort to force out long term employees through malicious and arbitrary disciplinary actions.*

*"In response to current working conditions, the employees of Ellen's Stardust Diner have organized and are fighting for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and back of house staff.*

*"Our mission is to preserve the Stardust family legacy in order to ensure that future generations of Stardusters and customers alike can enjoy the same experience that gives Ellen's its reputation. In order to do this, we must restore the trust between all employees so that we can move forward as the team we once were.*

*"SFU is a branch of the Industrial Workers of the World (IWW), the singing union. We are working to guarantee that all employees are safe, secure, fairly compensated and treated with the respect and dignity they deserve.*

*"Any terminations or disciplinary action of any kind by the employer will be considered retaliation for union activity. This is against the law, and we are prepared to take legal steps to protect our rights.*

*"This is our right and our responsibility.*

*"We are Stardust (Family United)."*

The statement also included a testimonial from Broadway actor Zak Resnick, which reads:

*"Ellen's Stardust Diner has been my second home for the last seven years. It has been a safe*



*haven for actors and singers to be able to earn a living while seeking out what they came to the city to do. I will always be grateful to that Ellen's. I met people who have become my family at that Ellen's. However, those days are over. Today's Stardust Diner is no longer a happy place. It is no longer a place that encourages and nurtures a family environment. It is no longer a place that allows "between jobs" actors to earn a respectable living. It is now nothing but a broken establishment full of fear mongering, ego, and distrust. This Stardust Diner is not welcome in my New York City." - Zak Resnick (Mamma Mia, Piece of My Heart, Aida)*

The owner of Ellen's Stardust, Ken Sturm, has since released a statement refuting the allegations.

About I.W.W. - The IWW is a member-run union for all workers, a union dedicated to organizing on the job, in our industries and in our communities. IWW members are organizing to win better conditions today and build a world with economic democracy tomorrow. We want our workplaces run for the benefit of workers and communities rather than for a handful of bosses and executives. We are the Industrial Workers of the World because we organize industrially.

This means we organize all workers producing the same goods or providing the same services into one union, rather than dividing workers by skill or trade, so we can pool our strength to win our demands together. Since the IWW was founded in 1905, we have made significant contributions to the labor struggles around the world and have a proud tradition of organizing across gender, ethnic and racial lines - a tradition begun long before such organizing was popular.

We invite you to become a member whether or not the IWW happens to have representation rights in your workplace. We organize the worker, not the job, and recognize that unions are not about government certification or employer recognition but about workers coming together to address common concerns.

Sometimes this means refusing to work with dangerous equipment and chemicals. Sometimes it means striking or signing a contract. Other times it mean agitating around particular issues or grievances in a workplace or industry.

The IWW is a democratic, member-run union. That means members decide what issues to address, and which tactics to use and we directly vote on office holders, from stewards to national offices. Why wait? Join the IWW and organize for a better future.

About Ellen's Stardust Diner - Founded in 1987 by Ellen Hart Sturm, Ellen's Stardust Diner is a unique 50's themed diner with live entertainment provided by its very own wait staff, making it a popular attraction for tourists, school groups, and New Yorkers alike. The restaurant boasts some of New York's most talented vocalists, and has been a stepping stone for over two hundred of Broadway's performers over the past 29 years.

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# **EXHIBIT F**

**From:** Stardust Family United <[joehill@stardustfamilyunited.com](mailto:joehill@stardustfamilyunited.com)>  
**Subject:** Meeting  
**Date:** August 30, 2016 at 9:05:41 AM EDT  
**To:** Ken Sturm <[ken@theiridium.com](mailto:ken@theiridium.com)>

Ken,

Stardust Family United is excited that you are interested in having a discussion with Union representatives about our concerns regarding restaurant operations. We are confident that we can move forward in a positive direction that will benefit both the staff and the company.

We would like to have a meeting on Friday at 1pm, if you are available, to begin the conversation.

Regards,

Stardust Family United

--

We. are. Stardust (Family United).

# **EXHIBIT G**

## AFFIDAVIT OF COUNSEL FOR THE EMPLOYER

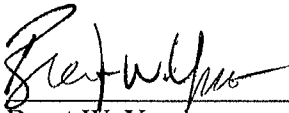
STATE OF NEW YORK     )  
                                  ) ss.:  
COUNTY OF NEW YORK )

The AFFIANT, being first duly sworn, does depose and attest as follows:

1. My name is Brent W. Yessin, and I am a resident of the State of Florida.
2. I am licensed to practice law in the States of Florida and Kentucky, and various Federal Courts nationwide, and have done so for more than 25 years.
3. I was retained by 1650 Broadway Associates, Inc. ("the Employer") to provide them advice and training in the National Labor Relations Act, a federal statute upon which I have provide counsel for more than 25 years.
4. I was on premises owned by the Employer on September 8<sup>th</sup> and 9<sup>th</sup> and professionals from my office and under my direction have been on site since August 29<sup>th</sup>.
5. During our time at the Employer we have witnessed "Recognitional Picketing" conducted by Industrial Workers of the World ("IWW") and their self-described affiliate "Stardust Family United" ("SFU") on at least two occasions.
6. During the picketing, the union had a banner with the IWW and SFU logos announcing "we are Stardust", as well as various posters and signs indicating bargaining objectives and handed out leaflets.
7. On August 30<sup>th</sup>, the SFU representatives by email requested a bargaining session with the Employer's CEO at 1 PM on September 2d to discuss a litany of working conditions that they had previously identified.
8. On September 9<sup>th</sup>, the undersigned had a discussion with several self-identified leaders of the SFU including Kenton Fridley, to confirm their demand to meet with the company management to negotiate terms and conditions of employment, and they claimed to represent the majority of the employees including, in their words "front and back of the house". They claim to have previously sent their bargaining proposals to the Employer.
9. I clarified with them that they meant by that "servers, bussers, runners, cooks and dishwashers, among others" and they responded in the affirmative. This includes all restaurant employees at Ellen's Stardust Diner.

10. On September 8<sup>th</sup>, the undersigned met with a small group of employees which included employees purporting to be leaders of SFU, including those associated publicly and quoted widely as the leadership of the union, including Kristine Bogan. Those employees, including Bogan, claimed to represent a majority of employees including "front and back of house" and said they had asked to meet with company management to negotiate on their terms and conditions of employment.
11. The IWW has identified the SFU as its affiliate representing workers at Ellen's Stardust Diner.
12. The attached petition was received by the employer, and represents 83 employees who claim they do not wish to be represented by the IWW.
13. Based on the claims of majority status by the union, the recognitional picketing that has taken place involving more than 10% of employees, the representation in the attached open source documents in which the SFU claims to represent the majority of workers, "front and back of the house", the emails requesting bargaining dates and recognition based on the presumed majority status, and the conflicting evidence presented by more than 35% of the workforce to the effect that they do not support the union, the employer has both been presented with a demand for recognition and has a good faith reasonable uncertainty as the union's majority status.

FURTHER AFFIANT SAYETH NAUGHT.



Brent W. Yessin

Sworn to and subscribed before me this the 13<sup>th</sup> day of September, 2016, by Brent W. Yessin, Esq., who is personally known to me, and who did take an oath.



Notary Public

**CHRISTINA E. NIEVES**  
Notary Public, State of New York  
No. 01N16337586  
Qualified in Bronx County  
Commission Expires 02/29/2020

# **EXHIBIT H**



**From:** Adam Hetrick [<mailto:ahetrick@playbill.com>]  
**Sent:** Wednesday, September 14, 2016 11:42 AM  
**To:** Edmund Tagliaferri <[edmund\\_tagliaferri@dkcnews.com](mailto:edmund_tagliaferri@dkcnews.com)>  
**Subject:** Fwd: FOR IMMEDIATE RELEASE: Unionized Staff at Ellen's Stardust Diner to Stop Singing After Multiple Terminations

Adam Hetrick  
Editor in Chief  
[Playbill.com](http://Playbill.com)  
729 7th Avenue, 4th Fl.  
New York, NY 10019  
Phone: (212) 557-5757 x114  
Email: [AHetrick@Playbill.com](mailto:AHetrick@Playbill.com)  
Twitter: [PlaybillAdamH](https://twitter.com/PlaybillAdamH)  
[facebook.com/playbill](https://facebook.com/playbill)

Begin forwarded message:

**From:** Stardust Family United <[joehill@stardustfamilyunited.com](mailto:joehill@stardustfamilyunited.com)>  
**Subject:** **FOR IMMEDIATE RELEASE: Unionized Staff at Ellen's Stardust Diner to Stop Singing After Multiple Terminations**  
**Date:** September 14, 2016 at 10:58:07 AM EDT  
**To:** undisclosed-recipients;

For Immediate Release: Stardust Family United

Contact: Joe Hill, (347) 913-3878, [contact@stardustfamilyunited.com](mailto:contact@stardustfamilyunited.com)

# Unionized Staff at Ellen's Stardust Diner to Stop Singing After Multiple Terminations

Staff at Ellen's Stardust Diner face antagonizing terminations, increased hostility, loss of privileges, after forming a union to combat an abusive and unsafe work environment.

Times Square, NY - It should come as no surprise that barely a week after Labor Day, a holiday set aside to celebrate the workforce of our great nation, Ken Sturm, owner of the famous Ellen's Stardust Diner, has unleashed his most despicable attack yet on the workers that have lifted his family to fortune for the last 30 years. On Tuesday, Sturm fired six long time employees in retaliation for their efforts to form a union to protect and improve their working conditions.

Bianca DiSarro, one of the servers terminated during yesterday's ambush, is truly sad that it's come to this. "I've always had such pride in the fact I was part of the diner's legacy. We created this union to assure that legacy didn't die at the hands of cruel and incompetent management; it's all very sad."

Two weeks ago workers announced the highly publicized formation of Stardust Family United, the Stardust employees' union branch, under the Industrial Workers of the World, which is supported by over 70 employees of Sturm's restaurant, Ellen's Stardust Diner. Through tears and frustration one of the servers terminated, Meg Doherty-Scannell, an employee of over five years, is still in shock with the arbitrary and heartless act.

"For so long I have just done what was asked of me and I have worked hard for this company. Through holidays, hurricanes and blizzards I showed up and did my job," she said. "When I spoke up, asking the business to treat me and my coworkers with the respect that is due to its dedicated employees I was ignored. Our cries for help in making this business better have fallen on deaf ears. And after all of this I was tossed aside and my integrity questioned. I feel completely betrayed."

Mr. Sturm had previously told multiple news outlets that he was looking forward to hearing his employees concerns, but so far his only communication with his employees regarding their union has been through forced meetings with his union-busting, fallacy spreading lawyers, and the plastering of anti-union, misleading propaganda in all corners of his business. To fight for a better work environment, over twenty charges of unfair labor practices have been filed with the NLRB and more are on the way.

Management has yet to respond to an email from SFU asking Sturm to meet with the newly formed union. He instead has hired famed union-buster Brent Yessin. During shifts, employees are taken into captive meetings with union busters, where they are told their union is unnecessary and will cause them loss of pay and federal rights. Fliers are regularly distributed to employees warning them against joining the union, specifically stating that employees should not sign a union card providing a home address or shift information because the union would "go to your home and talk to your family while you are working."

In addition, nearly thirty new servers have been hired. These new "Stardusters" are being trained in secretive meetings and told to not communicate with current staff members for the safety of their job. Part of their training has been intense, multiple hour

union busting meetings run by individuals who until recently refused to provide a business card or name.

It's not all sadness and frustration though. The union has received an outpouring of support for their work and cause. The Broadway community has sent in numerous videos showing support and proudly saying, "We Are Stardust".

Stardust Family United is a branch of the Industrial Workers of the World (the singing union) and is not seeking formal recognition at this time.

In response to recent retaliation from Sturm and manager, diner employees will be escalating union tactics today at 12PM. Servers will cease all singing in the restaurant for short intervals throughout the day. In addition, workers and supporters will gather outside of the diner located at 51st Street and Broadway to protest unfair labor practices committed by their employer. Come show your support!

--

We. are. Stardust (Family United).

#stardustFU

<Unionized Staff at Ellen's Stardust Diner to Stop Singing After Multiple Terminations.pdf>

# **EXHIBIT I**

**From:** Stardust Family United <[joehill@stardustfamilyunited.com](mailto:joehill@stardustfamilyunited.com)>  
**Subject:** To Ellen and Ken Sturm  
**Date:** September 14, 2016 at 2:40:58 PM EDT  
**To:** Ken Sturm <[ken@theiridium.com](mailto:ken@theiridium.com)>

Please see attached letter.

--

We. are. Stardust (Family United).

Ellen and Ken Sturm:

We would like to sit down and discuss our concerns with you. They are straightforward and are in the best interest of the restaurant: new equipment, adequate staffing, the immediate cessation of Unfair Labor Practices and the reinstatement of all employees unlawfully fired on and after August 24<sup>th</sup>.

We are interested in coming to a solution that is agreeable for both sides. We are confident that we can move forward in a positive direction that will benefit both the staff and the company. We are available for meetings this week.

Regards,

Stardust Family United

# **EXHIBIT J**

# **SERVERS ARE TOO SAD TO SING AFTER 6 OF THEIR OWN FIRED FOR UNION ORGANIZING**

Management at Ellen's Stardust Diner has responded to the unionization of its employees by firing 6 long term employees. All of these employees were prominent union members and organizers. This is an attempt to punish and intimidate employees for exercising their federal rights to act collectively to protect their rights and improve their workplace. In response, Servers will cease all singing in the restaurant for short intervals throughout the day.

**ASK YOUR SINGING SERVER HOW MANAGEMENT TREATS THEM!?**



# **##WEARESTARDUST**



# **EXHIBIT K**

# **EXHIBIT K**

**October 15, 2016**  
**Facebook Video**

# **EXHIBIT L**



SEP  
26

## Stardust After Dark

Public · Fundraiser · Hosted by Stardust Family United

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# **EXHIBIT M**



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"There is power in the union" ♥



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# **EXHIBIT N**



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**Stardust Family United** shared their event.

September 24 at 1:56pm · 🌐

TONIGHT: Join us as we #sing in #solidarity tonight in front of Ellen's Stardust Diner (SE corner of 51st and Broadway)!! 5PM!! Be there 🎤📺

#wearestardust #stardustfamilyunited #sfu #iww #wobblies #labormovement #workersrights #rally #protest #union #labor #nyc #broadway #timessquare #family



SEP

24

**SFU Musical Protest**

Sat 5 PM

38 people interested · 43 people going

★ Interested





## Stardust Family United

@stardustfamilyunited

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Write a comment...

Press Enter to post.



**Stardust Family United** shared their event.

October 15 at 10:27am · 🌐

Today is the day!! Come join us 51st & Broadway at 4:30pm! If anything, come out for the free show we'll be giving outside of the diner! That's right- no pricey cheeseburgers to hang with us 🍔🍷 Come support and sing with Stardust Family United! #wearestardust #sfu #IWW #singingwaiters #union #solidarity



OCT  
15

### SFU Musical Demonstration

Sat 4:30 PM · 51st and Broadway (SE corner)  
5 people interested · 15 people going

★ Interested

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Stardust Family United

October 7 at 12:07pm · 🌐

Starduster, Carly, and the Manhattan Sweethearts show their support with a little diddy! Thank you, ladies, for your beautiful support!

Want to know more about America's Sweethearts? Check out their Facebook page now for videos and booking info ❤️

#wearestardust #americassweethearts #stardustfamilyunited #holdtight #iww #union



2K Views

Like Comment Share

# **EXHIBIT O**



## Stardust Family United

@stardustfamilyunited

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More

TONIGHT @ 4:30PM \*..

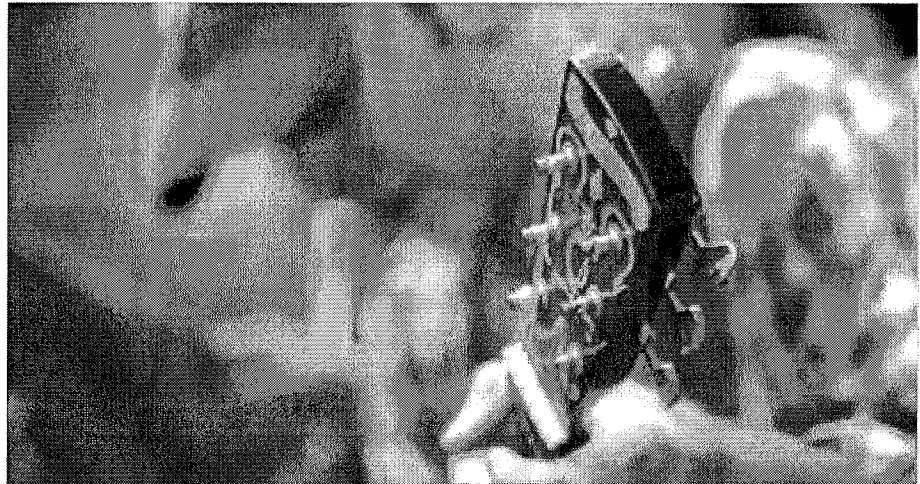
Join us as we protest unlawful terminations and unfair labor practices committed by the owners and management of Ellens Stardust Diner!

SFU fights to ensure the health and safety of those employed by Ellen's. Fix broken equipment. Make good on workman's comp claims. Simple. Basic. Fair. Together, we can make it better. Do the right thing Ken Sturm!

Rock out with us tonight ON BROADWAY! 51st and Broadway that is 🎸

#wearestardust #stardustfamilyunited #ellensstardustdiner #sfu

#labormovement #iww #workersrights #unionbusting #workingfamilies



OCT  
22

**SFU Musical Demonstration**

Sat 4:30 PM

23 people interested · 15 people going

★ Interested

# **REQUEST FOR REVIEW**

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November 29, 2016

Gary Shinnars  
Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001

**Re: Request for Review of Regional Director's Dismissal of the Employer's Election Petition Filed Pursuant to Section 9 of the National Labor Relations Act**

1650 Broadway Associates, Inc.  
Case 02-RM-184263

Dear Mr. Shinnars:

This Firm represents 1650 Broadway Associates d/b/a Ellen's Stardust Diner ("Stardust" or "the Company") in the above-referenced matter. Please accept the following as Stardust's request for review pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations.

On September 14, 2016, Stardust filed an RM petition to determine whether or not a majority of its employees supported Stardust Family United ("the Union" or "SFU") as their collective bargaining representative. On October 26, 2016, Stardust filed a position statement ("Position Statement") with the NLRB Region-2 in support of the RM petition. On November 22, 2016, the Regional Director of NLRB Region-2 ("Regional Director") dismissed Stardust's

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petition, stating that the evidence “failed to show that the Union’s conduct constituted a present demand for recognition or that the Union was seeking recognition as the employees’ representative.” The Regional Director concluded that the petition did not raise a question concerning representation.

Stardust requests a review of the Regional Director’s decision on the following grounds. The Regional Director’s factual finding that the evidence did not show that the Union sought recognition as the representative of employees was a clearly erroneous finding on a substantial factual issue that prejudicially affects the rights of Stardust. Additionally the Regional Director’s dismissal of this petition raises a substantial question of law because it departs from Board precedent determining what constitutes a present demand for recognition. See New Otani Hotel & Garden, 331 N.L.R.B. 1078 (N.L.R.B. 2000); Robert’s Tires, 212 N.L.R.B. 405 (N.L.R.B. 1974); Holiday Inn of Providence, 179 N.L.R.B. 337, (N.L.R.B. 1969); Capitol Market No. 1, 145 N.L.R.B. 1430, (N.L.R.B. 1964). This request for review includes a summary of the factual background, evidence, applicable law and argument presented by the Company to the Regional Director, establishing why the Regional Director’s decision should be overturned.

## **I. INTRODUCTION**

SFU is a labor organization which repeatedly has represented to the Company that it represents a majority of the Company’s employees employed at Ellen’s Stardust Diner. SFU made a demand for immediate recognition and a demand to negotiate the terms and conditions of employment on behalf of the Company’s employees whom it claims to represent. Indeed, for weeks it engaged in a systematic campaign for its recognition including hand billing, picketing

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and protesting within and directly outside of Ellen's Stardust Diner. SFU also made media appearances and issued press releases declaring itself to be a union and claiming that it represents the employees who work at Ellen's Stardust Diner. SFU's campaign has been aimed at pressuring the Company to agree with it regarding the terms and conditions of employment of the Company's employees whom it claims to represent. In response to SFU's representations and request for bargaining, on September 9, 2016, the Company filed an RM petition pursuant Section 9 of the National Labor Relations Act ("the Act"). For the reasons set forth more fully below, the Regional Director erred and departed from Board precedent in dismissing this petition.

## **II. FACTUAL BACKGROUND & SUMMARY OF EVIDENCE**

### **A. About Stardust**

Stardust is a 1950s-themed restaurant located at the corner of Broadway and 51st Street in Manhattan. Stardust, notable for its singing wait staff, has been in business since 1987 . Many aspiring musical performers and actors are drawn to work as singing servers or wait staff, known as "Stardusters." They often are performers in between show business jobs and/or who are frequently auditioning and otherwise pursuing a full time career in show business or other entertainment.

### **B. SFU's Demand for Recognition and Continuing Campaign for Recognition**

On August 26, 2016, representatives of SFU e-mailed Ken Sturm, an officer of Stardust, declaring that "the employees of Ellen's Stardust Diner have organized to stand up for our rights and the conditions of our employment." (e-mail appended to Position Statement as Ex. A). That



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e-mail also identified those whom it claimed to represent, namely that “[SFU] represents the interests of all front and back of house staff.” (Id.) (emphasis added). That e-mail further indicated that SFU was “working to guarantee that all employees are safe, secure, fairly compensated and treated with the respect and dignity they deserve.” (Id.). Less than an hour later, representatives of SFU e-mailed Mr. Sturm again, asserting that “all further meetings with staff will be arranged through the union” and that certain employees, then noticed to meet with management, would not meet with Mr. Sturm if the purpose of those meetings was to discuss “union activity, including the job-related protected concerted activities that have been taking place at the diner.” (E-mail appended to Position Statement as Ex. B).

SFU again proclaimed that it had formed a union in an a *New York Times* interview published on August 26, 2016. (A Manhattan Diner’s New Management has Servers Signing a Defiant Tune appended to Position Statement as Ex. C). The *Times* article further reported SFU’s representations that over 50 workers were involved in organizing, that they had notified management of their newly formed union on August 26, 2016 and were “seeking a variety of changes, including higher wages for non-tipped employees, protection from what they describe as a campaign of arbitrary discipline and a measure of job security, which they believe they have lost under the new management regimen.” (Id.).

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On or about August 28, 2016<sup>1</sup>, SFU began publicly soliciting donations for “the union.” (SFU crowd-funding website appended to Position Statement as Ex. D.) Since that date, SFU has been engaged in a fundraising effort to finance the Union. (Id.).

On August 29, 2016, SFU issued another press release. (“Singing Waiters Organize Against Alleged Unfair Treatment at Ellen’s Stardust Diner” appended to Position Statement as Ex. E.) In that press release, SFU again represented that it is comprised of “all back of the house workers, servers, runners, bussers, dishwashers and cooks. . .” (Id.) (emphasis added). It further stated that through the assistance of another union, SFU has the resources “to form [their] own union on ‘their’ terms.” (Id.). Similar to its prior press release, SFU reiterated and unequivocally proclaimed “[i]n response to current working conditions, the employees of Ellen’s Stardust Diner have organized and are fighting for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and back of house staff.” (Id.) (emphasis added).

On the heels of its second press release, on August 30, SFU representatives identifying themselves as “union representatives” by e-mail requested to meet with Mr. Sturm at 1 p.m. on September 2 to discuss “restaurant operations” that would “benefit both the staff and the company.” (e-mail appended to Position Statement as Ex. F).

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<sup>1</sup> SFU may have been soliciting donations and seeking additional financial support earlier than August 28, 2016. However, this is the earliest public solicitation the Company has been able to identify. The fundraising page remains active as of December 2, 2106. SFU also has advertised on their Facebook page as recently as November 29, 2016 that SFU is selling t-shirts with logo “#wearestardust” to raise funds for the Union.

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On September 9, 2016, counsel retained by Stardust had a discussion with several self-identified leaders of SFU, including Kenton Fridley, to confirm SFU's demand to negotiate the terms and conditions of their employment with Company management. (Counsel's affidavit appended to Position Statement as Ex. G). During that discussion, SFU representatives again claimed to represent the majority of the employees at Ellen's Stardust Diner, including those in the "front and back of the house" which the SFU representatives clarified encompassed "servers, bussers, runners, cooks and dishwashers, among others." (Id.).

On September 9, 2016, the Company filed the RM petition currently at issue. It did so because the SFU demanded recognition by presenting itself as representing all front and back of the house employees at Ellen's Stardust Diner and by demanding to negotiate over compensation, employee treatment and other terms and conditions of employment. In addition, SFU has continued to engage in recognitional picketing at various times including on September 2 and September 5, September 26, October 11 and October 15.

On September 14, 2016, SFU issued another press release. The SFU e-mailed this press release directly to Mr. Sturm. (e-mail from SFU attaching press release appended to Position Statement as Ex. H). Declaring its intentions, purpose and current status, SFU titled the press release "Unionized Staff at Ellen's Stardust Diner to Stop Singing After Multiple Terminations." (Id.). The press release again indicated that SFU was the "Stardust employees' union branch" which was at that time "supported by over 70 employees of the restaurant." (Id.). That press release further stated that SFU would be "escalating union tactics." (Id.).

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Later that day, SFU again e-mailed Mr. Sturm requesting a meeting to discuss terms and conditions of employment including: “new equipment, adequate staffing and the immediate cessation of [alleged] Unfair Labor Practices and the reinstatement of all employees [allegedly] unlawfully fired on and after August 24th.” (e-mail appended to Position Statement as Ex. I). SFU’s correspondence further stated that they were “interested in coming to a solution that is agreeable for both sides.” (Id.).

Thereafter, SFU increased hand billing, picketing and protesting of Stardust. The handbills alleged, among other things, that the Company had responded to the “unionization” of its employees by firing six “union members and organizers.” (handbill appended to Position Statement as Exhibit J). The handbill further stated that in response to those firings “servers [would] cease all singing in the restaurant for short intervals throughout the day.” (Id.).

SFU has continued declaring itself as a union and harassing Stardust to compel recognition and bargaining.<sup>2</sup> At least once a week, SFU posts images and videos depicting numerous protests, including recognitional picketing in front of Ellen’s Stardust Diner. On October 15, SFU posted a video to its Facebook page (which is one of many) depicting its picketing and protesting. (video appended to Position Statement as Ex. K.) In the video, an SFU representative loudly and clearly declares that the employees of Stardust “formed a union” and declares that they are seeking “better [working] conditions.” (Id.) (emphasis added). Also on October 15, SFU picketed with signs declaring, among other things, “Hey! We’re a Union!”

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<sup>2</sup> October 22 was the most recent demonstration when the Position Statement was filed with the Regional Director. Demonstrations have continued since that time, with the most recent one occurring on November 26, 2016.

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(Id.). SFU has posted numerous other pictures on social media of their recognitional picketing efforts.

SFU also maintains a website, on which it declares, similar to its previous representations that the union was formed “[i]n response to current working conditions, the employees of Ellen’s Stardust Diner have organized and are standing up for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and back of house staff.” (website, <http://www.stardustfamilyunited.com/ourfamily>, cited in Position Statement).

### **III. LAW & SUMMARY OF ARGUMENT**

#### **A. Section 9 of the Act**

Section 9(c)(1) of the Act provides in relevant part that where a petition is filed: “(B) by an employer, alleging that one or more labor organizations have presented to [it] a claim to be recognized as the representative defined in section 9(a) . . . the Board shall [process the petition].”

Section 9(a) provides in relevant part: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” New Otani Hotel & Garden, 331 N.L.R.B. 1078 (N.L.R.B. 2000).

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Thus, an employer is entitled to an election pursuant to Section 9(c)(1)(B) if there is evidence of a demand for immediate recognition by a majority of employees in an appropriate bargaining unit. Id. This is true particularly as here where the employer is enduring constant pressure and subjected to business disruptions over two months as the Union asks for bargaining and recognition, as recognition is needed for bargaining. By dismissing the Company's petition for election, the Regional Director in this matter departed from Board precedent.

**B. SFU is a Labor Organization Which Claims to Represent a Majority of Employees.**

The Regional Director did not deny that SFU constitutes a labor organization under Section 2(5) of the Act. The Company agrees with the Regional Director that SFU satisfies the definition of a labor organization.

**1. Labor Organizations Under Section 2(5) of the Act.**

Section 2(5) of the Act defines a labor organization as: “[a]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”

In order to constitute a labor organization under Section 2(5) the organization must satisfy two requirements: (1) employee participation and; (2) for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. See e.g. Polaroid Corp., 329 NLRB 424 (1999); Miller Indus. Towing

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Equip., Inc., 342 NLRB 1074 (2004). SFU clearly satisfies both of these requirements with regard to Stardust.

a. *SFU is Comprised of Stardust Employees*

SFU undoubtedly has employee participation. SFU has indicated on several occasions to both the Company and the general public that it represents employees of Stardust Diner, including those employees “in the front and back of the house.” (See e.g. Exs. A, B, C, F, & H.)<sup>3</sup> Moreover, SFU’s website clearly states “[i]n response to current working conditions, the employees of Ellen’s Stardust Diner have organized and are standing up for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and back of house staff.” See Stardust Family United, Our Family, available at <http://www.stardustfamilyunited.com/ourfamily>.) As such, SFU satisfies the first requirement.

b. *SFU Satisfies the “Dealing With” Requirement*

SFU also satisfies the second requisite element as its only articulated purpose is to deal with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work for the front and the back of the house employees. The Board and courts interpret the “dealing with” requirement broadly. In order to satisfy this requirement a labor organization must “exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions

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<sup>3</sup> All references to Exhibits refer to exhibits appended to the Position Statement submitted by the Company to the Regional Director on October 26, 2016 and described in the Factual Background & Evidence Summary section of this request.

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of work.” NLRB v. Cabot Carbon Co., 360 U.S. 203, 212 (1959). No magic words must be said in order for the SFU to satisfy the “dealing with” requirement. Moreover, the union need not be part of an established framework of an international or national union.

The SFU has satisfied the broad framework of the “dealing with” requirement. SFU has made several demands to Mr. Sturm to bargain over compensation, discipline and other terms and conditions of employment. See Exs. B, F & I. Even the “restaurant operations” issues that SFU sought to discuss with Mr. Sturm necessarily implicate employees’ terms and conditions of employment in the context raised by SFU of “stand[ing] up for our rights and the conditions of our employment.” See e.g. Exs. C, E, F, & J. As such, SFU unquestionably satisfies the “dealing with” element of Section 2(5). See Cabot Carbon Co., 360 at 212 (holding that an employee-committee system was a labor organization because it had discussions with management relating to seniority, job classifications, holidays, vacations, and various other conditions of employment); Thompson Ramo Wooldridge, Inc., 132 NLRB 993, 995 (1961) (holding that presentation to management of employee ‘views,’ even without specific recommendations as to what action is needed to accommodate those views, constitutes “dealing with” under Section 2(5).)

### **C. SFU Demanded Immediate Recognition**

#### *a. Present Demand for Recognition Established*

SFU has made a demand for immediate recognition and bargaining. The Regional Director’s finding that “[t]he evidence obtained during the investigation of the petition... fails to show that the Union’s conduct constituted a present demand for recognition” is clearly erroneous



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and it prejudicially affects the right of Stardust to obtain an election. A clearly erroneous ruling provides a compelling reason for the Board to review this decision. NLRB Rules & Regulations §102.67.

On August 26, 2016, SFU declared that it is the sole representative of Stardust employees and that “all further meetings with staff [would] be arranged through the union.” See Ex. B. Additionally, SFU has demanded a meeting with the Company to discuss the terms and conditions of employment of the employees at Stardust on at least three occasions. On August 30, SFU representatives requested to meet with Company representatives, including Mr. Sturm, to discuss a litany of working conditions that it previously had identified. Ex. B; see also Ex. G, Yessin Aff., ¶ 7. On September 9, SFU representatives again demanded to negotiate terms and conditions of employment with Stardust. Ex. G, Yessin Aff., ¶ 8. On September 14, SFU demanded a meeting and communicated that the purpose was to come to a “solution” that was “agreeable for both sides.” Ex. I.

While some of the demands may have been unartfully crafted, SFU’s meeting request and apparent attempt to prevent the Company from making any decisions on issues involving wages, benefits and other terms and conditions of employment of the employees without its involvement, as well as the SFU’s unambiguous attempt to bargain for the employees on their compensation and other terms and conditions of employment, amount to a demand by SFU for immediate recognition and bargaining. There would be no reason for the Company to meet with SFU over wages, benefits or other terms and conditions of employment unless that group was demanding recognition by the employer to recognize it as representing the employees.

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As such, SFU has made a demand for immediate recognition and the Company's election petition must be processed. See Robert's Tires, 212 N.L.R.B. 405 (N.L.R.B. 1974) (upholding employer's petition for an election pursuant to Section 9(c) because of the "circumstances giving rise to the picketing, including the Union's admitted attempt to persuade the employer" to come to an agreement regarding terms and conditions of employment); New Otani Hotel & Garden, 331 N.L.R.B. 1078 (N.L.R.B. 2000); Holiday Inn of Providence, 179 N.L.R.B. 337, (N.L.R.B. 1969); Capitol Market No. 1, 145 N.L.R.B. 1430, (N.L.R.B. 1964).

Moreover, the Board has found an immediate demand for recognition where in the context of other related events, an object of picketing is to press upon the employer a demand for immediate recognition. See e.g. Capitol Market No. 1, 145 N.L.R.B. at 1431 (holding that the union's threatened and initiated picketing was in furtherance of union's immediate recognitional claim after union demanded employer to sign a contract).

The Board has found a recognitional object in picketing activities when the purpose of proposed meetings between the union and the employer was to persuade the employer to hire union workers. Austin Constr. Co., 141 NLRB 283 (N.L.R.B. 1963) (finding a prohibited recognitional object for picketing under Section 8(b)(7) of the Act). When the Company did not respond to SFU's bargaining demands, SFU began engaging in organizational and recognitional picketing and has continued picketing Stardust's premises, repeatedly declaring its status as a union and proclaiming that it was seeking to negotiate terms and conditions of employment. See Ex. G, Yessin Aff., ¶ 5; Exs. J-O. Here, SFU's two month campaign of media and picketing and

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harassment at the Stardust restaurant is targeted at obtaining immediate recognition and persuading the Company to bargain with it.

The Board has explained that although some forms of picketing do not constitute a demand for recognition, “if informational or area standards picketing occurs in conjunction with other actions or statements establishing that the union’s real object is to obtain immediate recognition as the employee’s representative...the Board [will] find the union’s conduct is tantamount to a present demand for recognition.” New Otani, 331 NLRB 1078, \*9. In New Otani, the union’s requests for a neutrality and card-check agreement were not a present demand. In the instant matter, SFU’s actions and demands go beyond a request for neutrality or an agreement to a future card check.

SFU’s picketing in conjunction with press releases, written demands for bargaining, and its assertions, both to the public and to the Company, that it represents all Stardust employees establish the Union’s real object of immediate recognition. See New Otani, 331 NLRB 1078, \*9; Holiday Inn of Providence, 179 N.L.R.B. at 338 (holding that union’s comment “[a]re you ready to give up?” in the context of ongoing picketing was sufficient to constitute a continued interest in immediate recognition); Normandin Bros. Company, 131 N.L.R.B. 1225, 1226 (N.L.R.B. 1961) (holding that question affecting commerce existed concerning representation of certain employees of the employer under Section 9 because union’s picketing was consistent with a demand to bargain for a contract).

Therefore, SFU has made a demand for immediate recognition and the Board precedent should have compelled the Regional Director to grant this petition for election.

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*b. SFU Sought Recognition Despite Disclaimers*

The Regional Director also found that the evidence did not show “that the Union was seeking recognition as the employees’ representative.” (NLRB Decision to Dismiss, letter from Regional Director Karen P. Fernbach dated Nov. 22, 2016). The NLRB has held that explicit representations that employees are not requesting immediate recognition, when taken in context with other actions consistent with a demand for immediate recognition, are insufficient to defeat an employer’s election petition. See e.g. Holiday Inn of Providence, 179 N.L.R.B. at 338 (holding that letter to employer’s parent company indicating that the union was seeking permission in order to establish proper procedure for negotiating union contract was demand for immediate recognition despite later providing notice that it was “not attempting to organize the employees of this establishment and is not requesting recognition for this establishment”).

Therefore, SFU’s actions including engaging in organizational and recognitional picketing consistently and on many occasions throughout September and October up to and after the time of the Regional Director’s investigation and dismissal,<sup>4</sup> including demonstrations targeted directly at Company management undermine any argument that SFU has not demanded immediate recognition. See Exs. J-O. Thus, the representations that SFU is not and was not seeking recognition, its actions throughout September and October of 2016 belie that claim. See Grand Central Liquors, 155 NLRB 295, 301-02 (1965) (holding that employer’s election petition must be processed because the union’s entire course of conduct was inconsistent with its

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<sup>4</sup> Picketing or demonstrations have occurred nearly every Saturday through November, although not on November 19. Picketing has also occurred on September 26, October 11 and October 15.

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expressed disclaimers); Rusty Scupper, 215 NLRB 201 (1974) (holding that union had made a demand for recognition despite disclaimer that it was not seeking recognition because the disclaimer was inconsistent with object of picketing). Plainly and clearly, the SFU's actions are consistent with a demand for recognition as the Board has defined a demand in past precedent.

#### IV. CONCLUSION

The facts support the Company's basis for filing the RM Petition with the Board. Given that SFU is a labor organization claiming to represent the majority of Stardust's employees and is demanding immediate recognition, the Board under its statute is obliged to process the RM petition in this case. Accordingly, because SFU has made a demand for immediate recognition and continues to enforce that demand, the Regional Director's decision to dismiss was contrary to Board precedent. The Board should grant this request for review and should resume processing the RM petition.

A copy of this request for review has also been served on Benjamin N. Dictor, attorney for the Union, and on Karen P. Fernbach, Regional Director of the NLRB Region-2. Certificates of service are appended to this document.

Respectfully yours, ,

Patrick J. McCarthy

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cc: Karen P. Fernbach  
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